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BLEED THROUGH POOR COPY

Supreme Court of the United States

OCTOBER TERM 1951

No.....

G. RICORDI & COMPANY,
Petitioner,
against
PARAMOUNT PICTURES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, G. RICORDI & COMPANY, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on May 8, 1951 and June 1, 1951.

Opinions Below

The opinion of the District Court (R. 131) is reported in 92 F. Supp. 537. The opinions of the Court of Appeals of May 8, 1951 (R. 148) and of June 1, 1951 (R. 164), are unreported.

Jurisdiction

The judgments of the Court of Appeals were entered on May 8, 1951 (R. 152) and on June 1, 1951 (R. 165). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Is the copyright protection accorded petitioner's Grand Opera *Madame Butterfly* consisting of music, libretto and lyrics in the Italian language created by Puccini limited to the new matter contained therein or does the protection extend to and include also the interwoven English language source material utilized under Section 7 of Title 17, U. S. C., pursuant to a written contract with the proprietors thereof providing that "the said libretto and all rights therein, dramatic and otherwise, to be the exclusive property of" petitioner "for all countries of the world"?

2. Respondent having conceded as to the source material that petitioner alone can grant the right to produce Puccini's opera *Madame Butterfly* on the stage and otherwise (but not on the screen) (R. 57, fols. 170-171; R. 134, fol. 402) during the renewal copyright of the source material utilized under Section 7 Title 17 U. S. C. pursuant to a written contract with the proprietors thereof executed during the first copyright term of such source material conveying exclusive dramatic rights in the libretto of the opera, is the petitioner precluded from producing a dramatization of the Opera in the form of a motion picture?

3. Does petitioner require a further grant under the renewal copyright of the source material utilized in its Opera *Madame Butterfly* under Section 7 of Title 17 U. S. C. pursuant to a written contract made with the proprietors during the first copyright term of the source material providing that "the said libretto and all rights therein, dramatic and otherwise, to be the exclusive property of" petitioner "for all countries of the world"?

4. Do the words: "the said libretto and all rights therein, dramatic and otherwise, to be the exclusive property of" petitioner "for all countries of the world"; "exclusive dramatic rights of said operatic version * * * in any theatre in the world"; "all representations of said Opera in all countries"; and "nothing in this contract shall be deemed to confer upon (grantors) the right of allowing any other person or persons any rights whatsoever to dramatize, or to perform * * * in the form of an opera the said subject of *Madame Butterfly*" contained in a written contract pursuant to which the petitioner caused Puccini to create the opera *Madame Butterfly*, convey to the petitioner motion picture rights in all source material as interwoven in Puccini's opera *Madame Butterfly*?

Statute Involved

The pertinent statutory provision is Section 7 of Title 17 U. S. C. formerly Section 6 of the Copyright Act of March 4, 1909, reading as follows:

> "Sec. 7. Copyright On Compilations Of Works In Public Domain Or Of Copyrighted Works; Subsisting Copyrights Not Affected.—Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the *consent* of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works." (Emphasis added.)

Statement of the Case

Petitioner copyrighted Puccini's *Madame Butterfly* in its name in 1904 (R. 33, 149) relying upon and after wholly executing the agreement of 1901 (R. 45) hereinafter summarized, granting the use of source material, and later acquired from the son of Puccini the renewal copyright in the opera which it now owns (R. 34, 39, 149).

Petitioner sued for a declaration adjudging it to be the exclusive owner of the motion picture rights of every nature and type in its copyrighted three act Grand Opera *Madame Butterfly* and restraining respondent from asserting any interest in such motion picture rights. Petitioner moved for summary judgment in its favor. Respondent then cross-moved for summary judgment. On the pleadings, affidavits, exhibits and each party's proposed findings of fact and conclusions fo law, the District Court found no genuine issue as to any material fact, and granted petitioner's motion (R. 131; 92 F. S. 537).

Respondent appealed to the Court of Appeals which modified the judgment by excluding from motion pictures of the copyrighted opera the very source material the agreement of 1901 made available as "exclusive property" of the operatic version (R. 143, 151).

Petitioner derives its rights from John Luther Long as the author in English of a novel entitled *Madame Butterfly* and from David Belasco as the author in English of an authorized one act dramatic version (bearing the same title) of the novel, both of whom on April 27, 1901, joined in executing a grant in writing to petitioner giving it the exclusive right to use both the novel and its one act dramatic version for the creation of the libretto of an opera to be composed by Puccini. The only reservation in the grant is that the source material of the opera should be announced.

By the written grant of 1901 (R. 45) Belasco delivered to the petitioner his original unpublished English language manuscript of his one act dramatic version, and with Long

(1) agreed that petitioner may have *Madame Butterfly* for the libretto of an opera to be composed by Puccini;

(2) granted to the petitioner the exclusive rights for all countries of the world in all languages to make a libretto for an opera of the one act dramatic version of *Madame Butterfly* founded on the theme written by Long, the said libretto and all rights therein, dramatic and otherwise, to be the exclusive property of petitioner for all countries of the world; the exclusive right for all countries of the world to have the libretto set to music in the form of an opera and to be allowed to print and sell wherever petitioner may please the editions of the libretto and of the opera and all arrangements of the same in any language; the exclusive dramatic rights of the said operatic versions of the drama *Madame Butterfly* in any theatre in the world; the fixed money consideration named therein covering all rights already mentioned and all representations of the said opera in all countries;

(3) renounced the right of allowing any other person or persons any rights whatsoever to dramatize or to perform or to print in the form of an opera the said subject of *Madame Butterfly;* and

(4) certified that they are the owners absolute and have made no previous contract for an operatic version of the said subject *Madame Butterfly.*

Relying upon and pursuant to the grant petitioner engaged Puccini who created the three act opera *Madame Butterfly* consisting of new music, and of new libretto of new lyrics in the Italian language. The grant or con-

tract of 1901 was wholly executed and exhausted when petitioner copyrighted the Opera in 1904, after which date nothing remained to be done under the agreement.

Long's novel was published in the Century Magazine and copyrighted in the name of the Century Company on December 21, 1897 (R. 83-88). Both the Century Company and Long renewed this copyright in 1925 (R. 89-92).

Long's novel was published and copyrighted a second time, in his name, together with other stories on August 30, 1898 (R. 93-99). The record does not disclose any difference in the two publications and copyrights of the novel, nor a renewal of the second copyright.

Belasco's play was published and copyrighted in 1917, 1925, 1928 and 1935 (R. 79, 100-106). The record does not disclose any difference in the four publications and copyrights, nor a renewal of the 1917 copyright (R. 151).

Long lived for over two years after he renewed in 1925 the first of the two copyrights on his novel. The record does not disclose that he, his widow, his administrator or trustee ever objected to the use of the source material in the performances of the opera at the Metropolitan Opera House or elsewhere or the exercise of petitioner's other rights during the renewal term of the novel, or ever asserted that petitioner required a further grant under the renewal copyright of the novel. The absence of such objections and assertions and the consequent acquiescence harmonize with the declared intention expressed in the words "• • • the said libretto and all rights therein, dramatic and otherwise, to be the exclusive property" of petitioner "for all countries of the world", to assign during the renewal term of the novel the use of all source material interwoven in the opera.

The predecessors of respondent in 1913 and 1919 procured from Long, and in 1932 procured from the widow and the estates of Long and Belasco, the exclusive motion picture rights in the texts of the novel and its one-act dramatic version. The 1913 and 1919 grants expired

respectively in 1918 and 1924 (R. 64, 67) without any claim being made upon petitioner.

Claiming under the instruments of 1932 the motion picture rights in the three works, as distinguished from the motion picture rights in the text of the novel and in the text of its one-act dramatic version, the respondent, and it alone, asserted, but not until 1949, a claim of an interest in the motion picture rights in the three-act opera (R. 52), although respondent admits reading in 1946 in trade papers of the sale (by petitioner) of the opera *Madame Butterfly* for motion picture purposes (R. 52). This action followed immediately.

Specifications of Errors

The Court of Appeals erred:

1. In failing to hold that the written agreement of 1901 is more than a mere license and that it is an absolute and unconditional assignment without limitations, to petitioner, of all rights of Long and Belasco of so much of the source material of their novel and play in so far as it might have been actually interwoven in the creation of the opera; and in holding that petitioner has no independent continuing rights in the source material as interwoven into the opera.

2. In holding that the original and renewal copyrights in the opera are dependent upon the renewal copyright of the novel.

3. In failing to hold that the exclusive dramatic rights conveyed to petitioner by the written agreement of 1901 include motion picture rights in the interwoven source material that might have been interwoven in the opera.

4. In failing to hold void the two copyrights and the renewal copyright upon Long's novel.

Reasons for Granting the Writ

This Court Has Not Construed the Scope of Protection Under Section 7 of Title 17 U. S. C., Accorded New Versions When Produced With the Consent of the Proprietor of the Copyright of the Source Material. The Court Below Is In Conflict With Its Own Decisions and With the Court of Appeals For the Seventh Circuit.

Section 7 of Title 17 U. S. C., which is declaratory of prior law, has not been construed by this Court. Its construction by this Court is of vital importance to all copyright proprietors.

In the year 1950 there were registered for copyright protection 14,229 published musical and dramatico-musical compositions. Of this number approximately 25%, or 3,573 published musical and dramatico-musical compositions claimed copyright protection pursuant to grounds permitted in Section 7 of Title 17 U. S. C. Each prior year has its own volume of like registrations, the figures for which have not been obtained.

The extent to which copyright owners of new versions may enjoy protection in the source material as interwoven by consent in their new versions is vital to them because the very existence of their own copyrights during the renewal terms of the source material depends upon the solution to the problem of the scope of protection afforded them by Section 7, Title 17 U. S. C. It is consequently of unquestionable and considerable importance to untold numbers of copyright proprietors that this Court construe Section 7, Title 17 U. S. C., in its application to this class of works published and copyrighted in each of the years prior to 1950, for which alone statistics are given above, of which the copyright on the source material is being renewed from year to year.

Puccini's *Madame Butterfly* was created pursuant to petitioner's agreement of 1901 with Long and David

Belasco. That agreement gave petitioner the right to use Long's copyrighted novel and Belasco's manuscript play as source material for the opera.

The copyright in Long's novel and the common law right in the unpublished play protected both against use by others. The agreement of 1901 therefore permitted petitioner to use for one operatic version to be composed only by Puccini both the novel and the play in the exercise of petitioner's "exclusive rights for all countries of the world in all languages to make a libretto for an opera of his (Belasco's) dramatic version of *Madame Butterfly* founded on the original theme written by" Long and the "exclusive right for all countries of the world to have this Libretto set to music in the form of an Opera, and to be allowed to print and sell wherever they (petitioner) may please the editions of the Libretto and of the Opera and all arrangements of the same in any language".

Notwithstanding that part of Section 7 which reads: "but the publication of any such new works shall not * * * be construed to imply an exclusive right to such use of the original works * * *", the agreement of 1901 expressly conveys to the petitioner an exclusive right in, and an exclusive property to, the perpetual use in a single operatic version of the novel and play as source material. The agreement of 1901 manifests this intention by these words: "the said Libretto and all rights therein, dramatic and otherwise, to be the exclusive property of" petitioner "for all countries of the world". Even if such words were absent in the agreement of 1901, neither Long nor Belasco would have acquired any interest in the opera. Thus Long, Belasco and their respective successors divested themselves of all right, title and interest in all parts of the novel and play petitioner might have actually used for the single operatic version completed by Puccini and copyrighted by petitioner in 1904.

It is in the record that Belasco's dramatization was a one-act play (R. 22), that Puccini's opera *Madame Butterfly* was in three acts in the Italian language (R. 25), that

the opera is not a translation of the novel nor of the Belasco dramatization, nor are these set to music (R. 25).

When the opera was completed and the "exclusive property" in it secured to the petitioner by copyrighting it, there was nothing further to be done after 1904 by either Long, Belasco or petitioner. The contract became wholly executed and exhausted. Petitioner's rights became fixed and unalterable.

The Copyright Act protects copyrighted works from being copied. No distinction is made between the source material and other material present in a new version. Their unity is never dissolved. This is illustrated by compilations which admittedly contain source material that rests in common knowledge and in the unprotected domain. *Hartfield* v. *Peterson,* C. A. 2, 91 F. 2, 998. The only originality necessary to entitle a new work to copyright protection is in the sense that the author has created it "by his own skill, labor, and judgment without directly copying or evasively imitating the work of another," *Hoffman* v. *Le Traunik,* 209 Fed. 375; *Deutsch* v. *Arnold,* 22 F. Supp. 101, or in the sense of a distinguishable variation, *Gerlach-Barklow* v. *Morris & Bendien,* C. A. 2, 23 F. 2, 159.

If during the first term of the copyright of the novel Long sued petitioner for using the source material, it is obvious that the agreement of 1901 would constitute a complete defense as the "consent of the proprietor of the copyright" of the source material to interweave it into the libretto of the opera.

If during the renewal copyright term of the novel Long sued petitioner, or the petitioner sued a third party for copying the opera, under the decision sought to be reviewed the petitioner would be required to separate the interwoven source material from the other material constituting the opera and thus dissolve their unity. However, under the cases of *Hartfield* v. *Peterson,* C. A. 2, 91 F. 2, 998, *Gerlach* v. *Morris,* C. A. 2, 23 F. 2, 159, *Edmonds* v. *Stern,* C. A. 2, 248 F. 897, 898, and *Toksvig* v. *Bruce*

Pub. Co., C. A. 7, 181 F. 2, 664, 667, the petitioner would not be required to make such separation and dissolution.

The consent in the prior conflicting decision of *Edmonds* v. *Stern* appeared in a clause of the agreement which conveyed a right to make the new version and read as follows:

> "It is also covenanted and agreed that the" defendants "shall have the right * * * to have said song and musical composition arranged at their own expense for orchestra, band or other instruments, and that no royalties shall be claimed or paid upon copies of such arrangements sold or otherwise disposed of by them" (Record *Edmonds* v. *Stern*, fol. 228).

The prior conflicting decision of *Edmonds* v. *Stern* held that the copyright in the new version and the copyright in the basic work used as source material "were legally separate and independent of each other" and that "when that consent was given, a right of property sprang into existence, not at all affected by the conveyance of any other right". Thus the separation would not be required, and the new version would survive in the renewal term of the source material had the question arisen during the renewal term of the source material.

It is respectfully submitted that the following quotation from *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2, 664, 667, indicates that the Court of Appeals for the Seventh Circuit would not require the separation and therefore the Seventh Circuit is in conflict with the Second Circuit:

> "The question is not whether Hubbard could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research? In other words, the test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work."

The opinion now sought to be reviewed dissolves during the renewal copyright of the source material the intended

and agreed unity of the source material and the new matter of the copyrighted opera. The same Court (C. A. 2) in three cases entitled *Marks* v. *Vogel*, 140 F. 2, 266; 268; 270, refused to dissolve the unintended unity of lyrics and music of the copyright of a song to enable the lyricist to renew for himself alone the copyright in his lyrics and to enable the composer to renew for himself alone the copyright in his music, even though lyricist and composer were separated in time and space and had no actual contact, consultation or collaboration, and in one case lyricist and composer never met (266) when each created his component of lyrics alone and music alone and each separately sold his component to a song publisher.

Upon the Question of the Duration of the Agreement of 1901 the Court of Appeals Conflicts With Three Decisions of This Court

Fisher Music Co. v. *Witmark & Sons*, 318 U. S. 643, 657, 87 L. Ed. 1055, 1064, held that the Copyright Acts of 1909 and of 1831 did not nullify agreements by authors to assign their renewal interests before securing them and declined to limit authors in the manner of expressing their intentions.

Accordingly, only eight days later, it was said in *Rossiter* v. *Vogel*, C. A. 2, 134 F. 2, 908: "• • • in the last analysis the intention of the parties governs" (p. 910) and "actual words of assignment are not necessary" (p. 911) to convey rights under a renewal copyright before it is registered.

The agreement of 1901 was made during an era when the choice of appropriate words had not yet psychologically narrowed to the word "renewal" when that period of the copyright was intended to be included. Then, as now, intention governs, and the words "exclusive property" utilized in the agreement of 1901 convey the concept of perpetual ownership, possession and enjoyment to the exclusion of all others.

Acquiescence by Long, his widow, his administrator and his trustee from 1925 to the present day in a certain construction of the agreement of 1901 is evidence of the intention that petitioner's "exclusive property" in the source material of the opera should survive during the renewal period of the copyright in the novel, *Paige* v. *Banks,* 80 U. S. 608, 20 L. Ed. 709, where rights during a renewal were involved.

Long was the owner of the renewal copyright in his novel. The record does not show that the respondent obtained any interest in it except a license to make movies of its text. Respondent is not an assignee of Long's renewal copyright in any sense, and of right is powerless to challenge petitioner's rights when Long, his widow, administrator and trustee did not and do not. Indeed, respondent by conceding that petitioner alone can grant the right to produce the opera on the stage and otherwise (but not on the screen) (R. 57, 134) expressly concedes that the unity of the source material and the new matter of the libretto may not be separated or dissolved for any purpose or at any time.

Manners v. *Morosco,* 252 U. S. 317, 325, 64 L. Ed. 590, 594, did not involve a renewal copyright but centered around the duration of a mere license to produce, perform and represent a play. This Court held "the arrangement was to last as long as the public liked the play well enough to make it pay, provided the defendant kept his half of the bargain performed". Thus had the play in that case lived into the renewal period and had the public liked it well enough to make it pay during the renewal period, as is the fact with Puccini's opera *Madame Butterfly,* the right under the license to continue to produce, perform and represent the play would endure during the renewal period of the work.

Fitch v. *Shubert,* 20 F. S. 314, 315, did involve a renewal and a mere limited license. Although it held the duration of the license not to extend to the renewal, nevertheless the Court said, citing as authority *Manners* v. *Morosco:* "A license to produce a copyrighted play on the spoken

stage may well be a perpetual license where the agreement is silent as to duration of the licensee's rights".

The agreement of 1901 became wholly executed before February 8, 1904, when Puccini completed the opera, and it was deposited for copyright on that date. The petitioner did not through Puccini create other operas of the same source material. Acting upon and executing the agreement, the resulting property became the "exclusive property" of the petitioner.

As was said in *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558, 559, "A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category." Likewise, the agreement of 1901 being an executed agreement and a grant of exclusive property actually made, cannot be altered by the renewal of the copyright in the novel. By no act could Long or Belasco subsequently alter the executed agreement of 1901 or lessen the value of petitioner's exclusive property in the opera which Puccini created under the agreement which was fully and wholly executed in 1904.

The only right which remained to Long and Belasco was to sue for damages if petitioner failed to announce them as the author and dramatist of the source material. If such a suit could be brought during the renewal copyright term of the novel, as unquestionably it could, then surely the rights granted to the petitioner operate also during the renewal term of the novel.

Thus where the intention expressed is that the duration be "as long as the public liked the play well enough to make it pay", or that the property to be created be the "exclusive property", or the agreement becomes a fully executed agreement, the grantee's rights should not be divested during the renewal copyright of the source material.

Upon the Question of the Conveyance of Motion Picture Rights the Court of Appeals Is in Conflict With Two Decisions of This Court

Kalem Co. v. *Harper Bros.*, 222 U. S. 55, 56 L. Ed. 92, held that the right to dramatize includes the right to make and exhibit motion pictures.

Manners v. *Morosco*, 252 U. S. 317, 325, 64 L. Ed. 590, 594, held that the words "to produce, perform and represent" carry the right to motion pictures.

The agreement of 1901 conveys to the petitioner exclusive motion picture rights in all source matter constituting the opera by employing in accordance with the above case the following phrases: "the said Libretto and all rights therein, dramatic and otherwise, to be the exclusive property of" petitioner; "exclusive dramatic rights of said Operatic version * * * in any theatre in the world"; "all representations of said Opera in all countries"; and "Nothing in this contract shall be deemed to confer upon (the grantors) the right of allowing any other person or persons any rights whatsoever to dramatize, or to perform, or to print in the form of an Opera the said subject of Madame Butterfly".

The Duration of the Agreement of 1901 Should Not be Governed by an Inoperative Copyright Renewal

The agreement of 1901 conveyed to the petitioner the right to use or copy Belasco's play which then was unpublished and uncopyrighted. As the co-author (R. 101) of the play, Belasco had the right and power to bind Long by the conveyance. The subsequent copyright secured on Belasco's play was subject to petitioner's prior and superior rights under its agreement which the copyright could not efface.

The life of both Belasco's play and petitioner's opera should not be governed by the renewal copyright in Long's novel because the second copyright secured on the second

publication of Long's novel is void (1) by reason of an attempt to begin the first term of copyright in 1898 instead of in 1897, *Baker* v. *Taylor*, 2 Fed. Cas. 478, No. 782, and (2) by reason of the second attempt to invoke the statute upon the same novel, *Caligo* v. *Inter-Ocean Newspaper Company*, 215 U. S. 182, 54 L. Ed. 150. A general publication of the novel having taken place in 1898 and the copyright attempted to be secured thereon being void, the 1898 and the 1897 publications of the novel are both in the public domain because the same novel cannot be both protected and in the public domain. It follows that the 1925 attempt to renew a void copyright on the novel must be ineffective. Belasco's play having been held to be in the public domain (R. 151) and the renewal copyright on the novel being ineffective, the "exclusive property" in petitioner's opera during the life of its copyright is no more limited by the novel than by the play.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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